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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 462

POWERS HIGGINBOTHAM, Appellant,

versus

CITY OF BATON ROUGE, Appellee.

Appeal from the Supreme Court of the State of Louisiana.

BRIEF ON BEHALF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS APPEAL.

EDWARD RIGHTOR,
PAUL G. BORRON,
E. R. SCHOWALTER,
Counsel for Petitioner.

Montgomery-Andree Printing Co., Inc., 430-32 Chartres, N. O., La.

SUBJECT INDEX

TABLE OF CASES AND STATUTES CITED

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The official opinion delivered by the Louisiana Supreme Court is to be found in *183 Sou. 168* (Advance Sheets), Powers Higginbotham v. City of Baton Rouge, (see page 7 of Statement as to jurisdiction).

STATEMENT OF THE CASE.

Appellee, City of Baton Rouge, has filed a motion, under Rule 12 of this Honorable Court, seeking a dismissal of this appeal on the ground that "there was both a federal

and a state or local question involved in the decision of the case, and that the Supreme Court of Louisiana actually decided the case favorably to the appellee on both grounds and that the state or local question involved in the case was sufficient to sustain the judgment and decree of the State Supreme Court, and that therefore the federal question is only collaterally involved, and is not necessarily a basis for said judgment and decree. (Paragraph 2 of Motion to Dismiss).

SUMMARY OF THE ARGUMENT.

1. A state court cannot deprive this Court of jurisdiction by deciding an untenable question of State law.

2. The question of the existence or a contract *vel non* is one which this Court will determine for itself, the established rule being that where the judgment of the highest court of a state, by its terms or necessary operation, gives effect to some provision of the state law which is claimed by the unsuccessful party to impair the contract set out and relied on, this Court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the state law complained of impairs its obligation.

May It Please the Court:

1.

Learned counsel for appellee, in his motion to dismiss this appeal has not stated fully the grounds set forth in appellant's jurisdictional statement filed in the record, together with his petition for appeal and assignment of errors, and we respectfully request reference to said jurisdictional statement for a consideration of the question.

True, the Supreme Court of the State of Louisiana, after exhaustively considering and discussing the federal question specially raised and presented by appellant in pleadings, oral argument and brief, that appellant's contractual rights under Section 10 of Article I of the Constitution of the United States had been impaired and violated, and after determining such federal question adversely to appellant and holding that the Legislature of the State of Louisiana and the Commission Council of the City of Baton Rouge were exercising police power in violating appellant's special contract entered into with this said Commission Council under special legislative authority, and in so doing were not amenable to the said provisions of the Constitution of the United States, which ruling, within itself and without the necessity of further consideration of the case, constituted a denial of appellant's suit and an affirmance of the judgment of the Trial Court in dismissing the suit on an exception of no cause of action, did proceed further, in its opinion, and state, (apparently without serious consideration), that the Commission Council of the City of Baton Rouge, in any event, had the authority to terminate at will, the contract with appellant under its general charter powers, as provided by several Acts of the Legislature of

Louisiana, adopted long prior to the passage of Act No. 13 of the Third Extraordinary Session of 1934, which latter Act authorized appellant's contract of employment with said City, and in support of this ruling the learned author of the opinion cited the cases of *Kirkpatrick v. City of Monroe, 157 La. 545, 102 Sou. 822*, and *State ex rel. Loeb, Mayor of Opelousas, v. Jordan, 149 La. 313, 89 Sou. 15.*

We do not wish to intimate that the learned Supreme Court of the State of Louisiana in so impregnating its decision with a non-federal question had in view a desire or purpose to defeat appellant's right of appeal to this Honorable Court, but we do submit most earnestly that said non-federal ground so mentioned by the Supreme Court of the State of Louisiana in its opinion is glaringly untenable, unsound and unfounded, and therefore, cannot be relied upon to defeat the jurisdiction of this Honorable Court to review said decision on appeal.

Ward v. Love County, 253 U. S. 17, 64 L. Ed. 751.

Nothing we could say could more logically demonstrate the untenableness of the opinion of the Supreme Court of Louisiana in attempting to rest its decision upon a non-federal basis, than merely to point out in passing that in order to bring Higginbotham's case under the rule laid down in *Newton v. Board of Commissioers of Mahoning County, 100 U. S. 548, 25 L. Ed. 710*, and hence not under the rule laid down in *Hall v. Wisconsin, 103 U. S. (13 Otto) 5, 26 L. Ed. 320*, it had to establish the premise that Higginbotham was an officer. This it did by inadvertently substituting the word "office" for the word "service" in Sec. 4, paragraph (1) of Act 13 of the Third Extraordinary

Session of the Legislature of Louisiana for the year 1934 (page 13, "Statement as to Jurisdiction", third paragraph).

Appellant's contract of employment with the City of Baton Rouge was not made or entered into under or by virtue of the general legislative charter powers of the City, but under a special Legislative mandate, Section 4, Act 13, Third Extraordinary Session of 1934. That Section 21 of said Act 13 especially repeals "all laws or parts of laws in conflict" with its provisions, which repealing section reads as follows:

> "That all laws or parts of laws in conflict herewith are hereby repealed, except that this act shall not be held to repeal any special law fixing the salaries of any mayor or commissioner. Provided that cities or towns that have heretofore voted to come under or adopted the provisions of Act No. 302 of 1910 and Act 207 of 1912, shall continue to operate under said Act No. 302 of 1910 and Act 207 of 1912 as modified by this act, and except as otherwise provided herein.
>
> Provided that nothing in this Act shall be held to alter or repeal any provision of Act No. 22 of the second extra session of 1934, approved November 21, 1934, and if there is any provision in this Act which conflicts with any provision of said Act No. 22, approved November 21, 1934, the provisions of the said Act No. 22 shall prevail."

Act No. 22 of the Second Extraordinary Session of 1934, approved November 21, 1934, which is excepted from the foregoing repealing clause of Section 21 of Act 13 of the Third Extraordinary Session of the Legislature of Louisiana for the year 1934, deals with the selection of

heads of police and fire departments of all municipalities in the State, and in no way affects the issue in this case.

Therefore, it is apparent the Legislature, by this repealing section of said Act, withdrew from the City of Baton Rouge the right to discharge appellant without cause, or to abrogate without cause, any contract of employment made by the City with appellant by virtue of the authority granted by the Act. It is further evident that when the contract in question was entered into, the City had the express legislative authority to make the contract, and was possessed of no right or authority to impair or violate it, at will and without cause. The contract, at the date of its confection, was not affected or controlled by the general charter powers of the City, as they existed prior to the adoption of Sections 4 and 21 of Act 13 of the Extraordinary Session of 1934.

It is apparent the City, in justification of its right, at will and without cause, to impair its contract with appellant, cannot invoke general charter powers which no longer existed as to the special contract had with appellant.

True, the Legislature did attempt to restore to the City its general charter powers to discharge at will with respect to appellant's contract by Act Number 1 of the First Extraordinary Session of 1935, as stated by the Supreme Court of Louisiana in its decision (Tr. p. 30), but it is clear this repeal of Section 4 of Act 13 of the Third Extraordinary Session of the Legislature for 1934 and reinvesture in the City of Baton Rouge of the right to ter-

minate appellant's contract came too late to destroy appellant's vested rights under the contract.

> "A law enacted subsequent to a contract which, if valid, will have the effect of annulling the contract constitutes the most palpable form of legislative impairment, and such an enactment is clearly unconstitutional." *(12 C. J., Sec. 702, p. 1057).*
>
> "An ordinance granting a right accepted and acted upon by the grantee becomes an irrevocable contract. The right cannot be amended or diminished without the consent of the grantee.
>
> "The power retained after the grant does not include the authority to repeal, change, or modify the right granted." *Shreveport Traction Company v. City of Shreveport, 122 La. 1.* See *Saunders v. Carroll, 14 La. 227; D'Ile Rouge v. Carradine, 20 La. Ann. 244; Miles v. Mitchell, 20 Ann. 533; State v. Orleans, 32 Ann. 493; Affd. 102 U. S. 203, 26 L. ed. 132; Hall v. Wisconsin, 103 U. S. (13 Otto) 5, 26 L. ed. 302.*

The cases of *Kirkpatrick v. City of Monroe, 157 La. 645, 102 So. 822,* and *State ex rel. Loeb, Mayor of Opelousas, v. Jordan, 149 La. 313, 89 So. 15,* are clearly not in point nor controlling here. In the *Kirkpatrick Case,* the Court found, and the case was disposed of on the point, that the contract of employment between the City and the plaintiff was *ultra vires,* and, being *ultra vires,* could be terminated by the City without obligations, because no legal contractual obligation had been undertaken. The Court did incidentally go further and say that in any event the City had the right to remove such employee under its general charter powers. It is very evident such is not the situation here. The contract with the plaintiff in the *Kirk-*

patrick Case was not authorized by a special mandate to the City from the Legislature, but was an ordinary contract of employment under the general charter powers of the City which gave the City authoriy to discharge, at will, employees.

In the *Loeb Case* cited by the Court no question of contract rights was involved. It presented no suit for damages for wrongful violation of contract of employment. The case was a *quo warranto* proceeding by the Mayor of the City of Opelousas to remove the defendant Jordan from office under Article 867 of the Code of Practice of the State of Louisiana. This article is available only against "a person who claims or usurps an office in a corporation." The defense was that the removal or discharge of defendant by the City Council was not in conformity with the rules provided by an existing ordinance of the City. The Trial Court rendered judgment in favor of the City, enjoining defendant from attempting to exercise any of the functions of his office, incidentally stating in his opinion that defendant's only remedy was to bring suit for his salary for the unexpired portion of the term of his office or employment. Reversing the judgment of the Trial Court and sustaining the contention of the defendant that he had been improperly discharged, the organ of the Court in the case stated:

> "The theory on which the district court rendered judgment on the pleadings and without hearing evidence was that defendant's only recourse was to claim his salary for the unexpired portion of the term of his employment. For that reason, it was stated in the judgment that it was rendered without prejudice to the defendant's right, if any he had, to sue for the salary for the unexpired part of his term

of employment. The court had reference to article 2749 of the Civil Code. * * *"

> "An officer of a municipal corporation is not to be regarded as a laborer, within the meaning of article 2749 of the Code. This suit, instituted by resolution of the mayor and board of aldermen, is a quo warranto proceeding, which, according to article 867 of the Code of Practice, is available only against 'a person who claims or usurps an office in a corporation.' By the method of his proceeding, therefore, the relator has assumed that defendant was not an ordinary employee, but an officer of the corporation. It would not affect our judgment in this case, however, if we should assume that defendant was an ordinary employee, and not an officer of the corporation. It is admitted that he was not given a hearing on the accusation of insubordination and of assaulting the mayor, for which he was discharged."

Therefore, it is clear that the two cases above referred to and cited by the learned Judge of the Supreme Court of Louisiana in passing reference to a non-federal question are clearly without application to the present case, and that the non-federal question suggested by the organ of the Court is neither serious nor substantial.

This Honorable Court has long laid down and consistently followed the rule that:

> "Where the jurisprudence of the Federal Supreme Court is invoked on the ground of denial of a Federal right by a state court, the Supreme Court will inquire not only whether the right was denied in direct terms, but also whether it was denied in substance and effect by interposing a non-Federal ground of decision having no fair support."

Ancient Egyptian Arabic Order v. Michaux, 279 U. S. p. 737, 73 L. ed. p. 931, citing *Creswill v. Grand Lodge, K. P., 225 U. S. 246, 258, 261, 56 L. ed. 1074, 1078, 1080, 32 Sup. Ct. Rep. 822; Ward v. Love County, 253 U. S. 17, 22, 64 L. ed. 751, 758, 40 Sup. Ct. Rep. 419; Davis v. Wechsler, 263 U. S. 22, 24, 68 L. ed. 143, 145, 44 Sup. Ct. Rep. 13; Railroad Commission v. Eastern Texas R. Co., 264 U. S. 79, 86, 68 L. ed. 569, 572, 44 Sup. Ct. Rep. 247; New York C. R. Co. v. New York & P. Co., 271 U. S. 124, 126, 70 L. ed. 765, 767, 46 Sup. Ct. Rep. 447.* See also *State of Indiana ex rel. Dorothy Anderson v. Brand, Trustee of Chester School Township of Wabash County, Indiana, 82 L. ed. (Adv. 444, 58 S. Ct. 443),* and that

"Non-Federal grounds put forward by the highest state court as the basis for its decision, but which are plainly untenable, cannot serve to bring the case within the rule that the Federal Supreme Court will not review the judgment of a state court where the latter has decided the case upon an independent ground not within the Federal objections taken, and that ground is sufficient to sustain the judgment." *Coleman Ward v. Board of County Commissioner, 253 U. S., p. 17, 64 L. ed., p. 751.*

In the body of the case at *page 758* the Court says:

"Of course, if non-federal grounds, plainly untenable, may be thus put forward successfully our power to review easily may be avoided."

In the case of *Abie State Bank v. Bryan, 282 U. S., p. 765, 75 L. ed. 690,* this Court held:

"A Federal ground being present, it is incumbent upon the Supreme Court of the United States, when it is urged that the decision of a state court rests upon a non-federal ground, to ascertain for

itself, in order that constitutional guaranties may appropriately be enforced, whether the asserted non-federal ground independently and adequately supports the judgment.

> "The Supreme Court of the United States has jurisdiction to review a decision of a state court based upon both a federal and a non-federal ground where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other."

2.

Higginbotham sued on a special contract of employment, further alleging that Act 1 of the First Extraordinary Session of the Legislature for the year 1935 impaired the obligation of said contract, in violation of Section 10 of Article 1 of the Constitution of the United States. The Supreme Court of Louisiana in passing upon the existence of said contract, gave effect to Act 1 of the First Extraordinary Session of the Legislature of Louisiana for the year 1935 (pp. 14 and 16, Statement as to Jurisdiction). This Court has long established and consistently followed the rule laid down in *M. & O. R. R. Co. v. State of Tennessee, 153 U. S. 486, 38 L. Ed. 796,* to the effect that:

> "The question of the existence or non-existence of a contract in cases like the present is one which this court will determine for itself, the established rule being that where the judgment of the highest court of a state, by its terms or necessary operation, gives effect to some provisions of the state law which is claimed by the unsuccessful party to impair the contract set out and relied on, this court

has jurisdiction to determine the question whether such a contract exists as claimed, and whether the state law complained of impairs its obligation."

We have earnestly endeavored to establish that this appeal comes within the well recognized bounds of this Court's jurisdiction. We, accordingly, respectfully trust that this Honorable Court will not refuse or decline to give appellant a hearing on the merits of his appeal merely because an unsound and unsubstantial non-federal question is suggested and indicated in the opinion sought to be reviewed.

We respectfully submit, the motion to dismiss should not prevail.

Respectfully submitted,

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